1 - [redacted]
1 - Mr. Finzel
Attn: [redacted]
1 - Mr. Greenleaf

March 23, 1981

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[redacted]

OUTSIDE SOURCE

1 - Mr. Monroe
Attn: [redacted]
1 - Mr. Blake
1 - [redacted]

Attached 7326

Dear [redacted]

This will acknowledge receipt of your letter to the Director dated March 11, 1981, and received in this office on March 17, 1981.

We have reviewed your letter [redacted] We have referred this request to the Department of Justice and they will notify you of their decision.

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b7D

Sincerely yours,

61

John A. Mintz
Assistant Director - Legal Counsel

MAILED 11
MAR 26 1981
FBI

1 - Honorable John S. Martin, Jr.
United States Attorney
One St. Andrew's Plaza
New York, New York 10007

Attention: Mr. Peter C. Salerno
Assistant United States Attorney

V-30
DE-6

62-118023-293

1 - Office of Professional Responsibility
Attention: Mr. Michael E. Shaheen, Jr.

2 MAR 27 1981

2 - Acting Assistant Attorney General
Civil Division
Attention: Mr. Mark J. Kurzmann
Mr. R. Joseph Sher

Exec AD Inv. ___
Exec AD Adm. ___
Exec AD LES ___
Asst. Dir.:
Adm. Servs. ___
Crim. Inv. ___
Ident. ___
Intell. ___
Laboratory ___
Legal Coun. ___
Plan. & Insp. ___
Rec. Mgnt. ___
Tech. Servs. ___
Training ___
Public Affs. Off. ___
Telephone Rm. ___
Director's Sec'y ___

RAM:imw
(12)

SEE NOTE - PAGE TWO

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MAIL ROOM

would have been to no avail, and our grant of equitable immunity would be meaningless. The damage to Rowe thus equals much more than "the cost, anxiety, and inconvenience of having to defend against a single criminal prosecution." *Younger, supra*, 401 U.S. at 46, 91 S.Ct. at 751.

I have no difficulty finding extraordinary circumstances in the facts of this case, such as to justify affirming the district court's grant of equitable relief. I, therefore, concur in the judgment rendered by the majority, though I differ with its analysis for the foregoing reasons.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

Mr. Finzel 5-28-81

[redacted] b6 b7C

[redacted] v.
UNITED STATES OF AMERICA, et al.
(U.S.D.C., S.D.N.Y.)
CIVIL ACTION NO. 76 CIV 903 (CES)

Gary Thomas Rowe

PURPOSE: To record the receipt of photographs from the Department of Justice (DOJ) which were obtained from FBI files by the Rowe Task Force.

RECOMMENDATIONS: 1. Will attempt to determine the source of the 36 photographs bearing no FBI file number and advise the DOJ.

2. Will maintain contact with Mark Kurzmann, DOJ, for information as to when the identified photographs may be returned to file.

3. Will return photographs to appropriate field office files when no longer needed at FBIHQ.

(CONTINUED - OVER)

1 - Mr. Mintz
(Attn: [redacted])
1 - Mr. Finzel
1 - [redacted]

TEV:dte (6)

50 JUN 5 1981

1 - [redacted]
1 - (62-117449)
1 - (62-118023)
1 - (197-1263)

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62-118023-

NOT RECORDED
26 JUN 2 1981

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Memorandum from [redacted] to Mr. Finzel
Re: [redacted] v. United States of America, et al.

DETAILS: Objection to certain photographs was raised by the plaintiff in [redacted] v. United States (U.S.D.C., S.D.N.Y.) (76 CIV 983 CES). The objection centered on the photographs from Birmingham file 149-16-1A81. It was determined that the Rowe Task Force had seized the original photograph from this exhibit. On 5-11-81 [redacted] Office of Professional Responsibility (OPR), DOJ, made available all of the photographs which had been in possession of the Rowe Task Force. She states that in view of the Attorney General's formal claim of privilege of the Rowe Task Force Report, the photographs should not be disclosed without advising OPR.

The following is a listing of the photographs which were received from OPR:

ITEM	IDENTIFICATION NUMBER	DESCRIPTION
1	149-16-1A81	Large photograph at bus station (in two pieces);
2	MO 149-17-1A1	Same photo as number one, but no writing on back (Mobile file destoyed);
3	149-16-1A81	Small insert photo made from number one above (Photo of individual 12);
4	44-1236-1A58	Photo of Rowe;
5	157-954-1A1	Photo of Eaton;
6	157-852-1A_	Color photo of Rowe's machine gun;
7	149-16-1A82	Photo of [redacted]
8	157-352-1A237	Photo of a corpse (also attached is a photo of 17th Street Baptist Church);
9	157-352-1A218	Color photo of Robert Chambliss;
10	157-356-1A5	Color photo of a truck, and five negatives;

(CONTINUED - OVER)

SUMMARY OF RESULTS

OF THE

DEPARTMENT OF JUSTICE TASK FORCE INVESTIGATION ON

GARY THOMAS ROWE, JR.

Department of Justice

One of these two incidents is that concerning violence at the Trailways bus station in 1961, which is discussed in detail below. The other involved an attempted Klan attack on an elderly white couple who were raising a black child. Rowe told the Task Force that during this incident he had tried to throw a sheet over the man's head, but FBI documents from the time reveal no such active involvement by Rowe.

[redacted]

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Rowe did report to the FBI Klan plans to attack persons attempting to integrate stores and buses, but there was no evidence discovered that would substantiate Rowe's current claims that he participated in such attacks. Instead, FBI files indicate that the plans were never carried out, and that in one instance Rowe actually discouraged the use of violence at a meeting at which these plans were discussed.

In sum, with the exception of the Trailways bus station incident discussed below, the Task Force found no evidence to corroborate Rowe's recent claims that he actively participated in acts of criminal violence for the Klan in this early period and reported them to his handling agent. Additionally, records from that time indicate that agents did warn Rowe not to engage in violence.

The Trailways Bus Station Incident

The Task Force conducted an extensive investigation of Rowe's role in the violence which occurred at the Trailways bus station in Birmingham when CORE freedom riders arrived on

May 14, 1961. The evidence examined by the Task Force supports Rowe's recent claims that he was more deeply involved in the violence than FBI files of the period would indicate.

[redacted] b2 b7D

On May 12, 1961, Rowe reported to his handling agent Klan plans to attack the CORE freedom riders when they arrived at the bus station on the 14th. The FBI in turn related this information to local authorities. Rowe also reported that he was to act as one of five "squad leaders" at the depot. The "squad leaders" were not to participate in the planned violence at the station, but were to follow the CORE leaders and attack them later. The information Rowe provided was transmitted to FBI Headquarters.

On the 14th, a brawl broke out as the CORE group approached a "white only" waiting room at the station. Several people were injured in the melee. The beating of one victim who was not a member of the CORE group [redacted] was photographed by [redacted] b6 b7C and published on the front page of that newspaper. The FBI's copy of the photograph, which was used extensively in the FBI's investigations of the Trailways bus incident, bears notations on the back indicating that it was Rowe who identified three of the men in the picture. In addition, a May 1961 FBI memorandum establishes that one of Rowe's handling agents

had discussed the photograph with Rowe. When interviewed by the Task Force, Rowe was able to identify the large man in the photograph with his back to the camera and holding the victim as Rowe.

Rowe's appearance in the Post-Herald photograph, and statements of witnesses to the incident in reference to the photograph, link Rowe not only to the beating of [redacted] but also to the subsequent beating of [redacted] and the harassment of [redacted] at the scene, [redacted] was also harassed, and several days after the incident Rowe told his handling agent that he had smashed the window of [redacted] car. b6 b7C

A May 16th field office teletype to FBI Headquarters reported that the field office was intensively investigating the incident and had interviewed Rowe about it. Rowe had advised that he was not personally involved in the violence at the station, that he peacefully obtained film from [redacted] and that he had participated in the [redacted] incident, but had not struck [redacted] Furthermore, a memorandum written the next day indicates that when Rowe advised his handling agent about the Trailways plans before the incident, [redacted] b2 b7D

[redacted]

Thus, while the Post-Herald photograph linked Rowe to the [redacted] beatings and a memorandum by Rowe's handling agent establishes that he discussed the photograph with Rowe soon after the incident, there is no FBI record of Rowe having been identified as one of the men in the photograph or as a possible participant in the [redacted] beatings. To the contrary, at the time Rowe down played his role and documents indicate that the FBI believed his accounts.

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Rowe's Activities From May 1961 Through June 1963

[redacted]

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The Task Force examined four events from this period on which Rowe reported. Two concerned incidents occurring at a Bessemer, Alabama carnival and at a restaurant at which Rowe now claims he participated in assaults on several people. FBI files from the period do not corroborate Rowe's present characterization of extensive involvement in these incidents. However, Rowe did make a report to his handling agent six weeks after the carnival incident indicating that he had been present. The handling agent's recollection of this incident is vague, but he stated in his Task Force interview that he believed that Rowe had told him at the time that he was not personally involved in the fighting that took place.

On September 25, 1965, two bombs exploded on Center Street, a black neighborhood in Birmingham. Rowe was near the site of these bombings and was actually on the telephone to his handling agent reporting the first explosion when the second explosion occurred. Rowe explained that he was present in the vicinity because he was taking [redacted] b6 b7C [redacted] home. The next day, Rowe's handling agent called Rowe to question him further about the bombings and asked specifically about Robert Chambliss. At that time, records show that Rowe responded that he had no information linking Chambliss to this or any other of the bombings of the period.

Seven months later in May 1964, when being interviewed again by the FBI about the Birmingham bombings, Rowe stated that he had heard Chambliss discussing the use of shrapnel bombs, such as the one used in the Center Street bombing, three days before the church bombing and thirteen days before the Center Street bombing. There is no record that Rowe reported this information to the FBI at any earlier time. To the contrary, his earlier reports were that he had no information implicating Chambliss in any of the bombings.

Thus, the information Rowe gave the FBI about the 1963 bombings was quite limited. When interviewed by the Task Force, the agents involved in the bombing investigations stated that Rowe was not regarded as a suspect in any of the bombings. Other than Rowe's own statements in 1977 and 1979 regarding his presence at the [redacted] bombing, there was no evidence

discovered that indicated that Rowe had participated in any of these incidents or knew very much about them when first questioned by the FBI.

The Shooting Of An Unidentified Black Man

In July 1978, a report appeared in the New York Times that Rowe had shot an unidentified black man in the summer of 1963. In his 1979 Task Force interview, Rowe confirmed this report, stating that he had shot a black man who was part of a crowd that attacked his car. He could not recall exactly when the shooting occurred. Rowe also told the Task Force that he had reported the shooting to his handling agent [redacted] b2 b7D

[redacted]

The Task Force related Rowe's account of the shooting to two of Rowe's handling agents, both of whom replied that Rowe had never mentioned the alleged shooting. However, another of Rowe's handling agents stated in his Task Force interview that Rowe had related an account of such a shooting to him several times, probably in the summer of 1965 when Rowe was no longer acting as an informant. This agent also recalled having discussed the story with another person who believed that the man allegedly shot had been treated at a Birmingham clinic.

At the request of the Task Force, [redacted] b6 b7C

[redacted] reviewed autopsy reports from the period and could find no homicide which would correspond to the account given by Rowe. The coroner's records, however, would not contain information about a non-fatal shooting.

No information relating to this shooting was found in a review of FBI files. Thus, while one of Rowe's handling agents recalls 1965 discussions of a shooting similar to Rowe's accounts in 1978 and 1979, there is no other evidence to support Rowe's claim that the shooting occurred or that he reported the shooting to the FBI when it occurred.

Rowe's Activities From January 1964 To March 1965

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In at least three instances, reported Rowe's involvement in incidents which Rowe himself did not report. These included information that Rowe had assaulted several blacks at a baseball game (Rowe characterized this incident in his Task Force interview as not being "Klan business" and thus not subject to inclusion in his reports to his handling agent), raised money for the purchase of weapons, and struck a reporter at an Atlanta segregationists' rally (Rowe denied this in his Task Force interview).

In March 1964, Rowe reported that he had been designated as the leader of an "action squad" (violence squad).

Rowe did withdraw as squad leader, but was permitted, with the knowledge of Headquarters, to remain as a member of the squad.

[redacted] b2 b7D

Rowe was elected Klokan Chief of the Eastview Klavern in December 1964. The Klokan Committee was responsible for Klan security. [redacted] told Rowe's handling agent that in 1964 all plans for violence had been approved by this committee. Rowe's handling agent did not believe the informant's assessment of the nature of the committee. There is no reliable information indicating that the committee had such a function at the time Rowe was its Chief. b6 b7C b7D

Conclusion: Was The FBI's Supervision Of Rowe Adequate?

Rowe recently has alleged that he participated in numerous acts of violence while an FBI informant and that he kept the FBI fully informed of these activities. The evidence examined by the Task Force indicates that this allegation is exaggerated. It appears that one of Rowe's handling agents knew or should have known that Rowe was more deeply involved in the beatings at the Trailways bus station in 1961 than he reported. It also appears that in other instances, reports of Rowe's involvement in assaults were brought to the attention of his handling agents. However, no evidence was discovered to corroborate Rowe's allegations that he contemporaneously reported to his handling agents his having shot an unidentified black man and having been present at one of the 1963 Birmingham bombings. As stated previously, records do indicate that Rowe actually helped prevent Klan violence on more than one occasion.

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[redacted] Finally, there was no evidence that the FBI condoned or encouraged violent acts by Rowe.

II. THE KILLING OF VIOLA LIUZZO

At approximately 8:00 p.m. on March 25, 1965, Mrs. Viola Liuzzo was shot and killed while driving with [redacted] on U.S. Highway 80 between Selma and Montgomery, Alabama. Mrs. Liuzzo had attended a civil rights rally at the state capitol in Montgomery that day which was the culmination of a march from Selma to Montgomery. After the rally, Mrs. Liuzzo, accompanied by [redacted] had driven other participants in the day's activities to the Montgomery airport and Selma. Mrs. Liuzzo and [redacted] were returning to Montgomery when she was shot.

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Undisputed Facts

The following facts about the Liuzzo killing are not in dispute. The fatal shot was fired from a car owned and driven by [redacted] Gary Thomas Rowe, [redacted]

[redacted] and William O. Eaton were passengers in [redacted] car at the time of the shooting. FBI laboratory analysis established that the murder weapon was [redacted] .38 caliber pistol. b6 b7C

The four men left Bessemer, Alabama in the morning of March 25 to go to Montgomery where the civil rights demonstration was to take place. [redacted] and Eaton were members of the Bessemer Klavern and [redacted] the state Klan organization. Rowe had known the three from previous Klan activities. Before he left, Rowe called his handling agent to advise him of the plans. The agent told Rowe it was alright to go along on the trip but to call when he returned. Almost immediately, the agent called FBI Headquarters and the Selma FBI office to let them know what was happening.

After spending the day in Montgomery, the four left for Selma in the late afternoon. In Selma, Mrs. Liuzzo stopped at a red light next to the [redacted] car. The four men followed the Liuzzo car out of Selma for 25 miles on Highway 80. At about 8:00 p.m., the [redacted] car passed the Liuzzo car on the left and one of the passengers fired a .38 pistol into the Liuzzo car several times. One of these shots struck and killed Mrs. Liuzzo. Another passenger fired shots from a smaller caliber weapon which struck the Liuzzo car but did not hit either Liuzzo or [redacted]

After the shooting, the four men returned to Bessemer by way of Montgomery, splitting up at approximately 11:00 that

In September 1978, Rowe was indicted by an Alabama grand jury for the Liuzzo murder. He has not yet gone to trial on this charge. A federal court has enjoined the indictment, but Alabama has appealed the ruling.

The Dispute Over Who Fired The Fatal Shot

The central issue currently in dispute regarding the Liuzzo murder is who fired the fatal shot. Although it is clear that [redacted] pistol was the murder weapon, there has never been an allegation nor any evidence to suggest that [redacted] who was driving, fired his pistol into the Liuzzo car. Rowe, [redacted] all agree that Eaton fired into the Liuzzo car, but that he used his own .22 caliber pistol. Therefore, the evidence supports the conclusion that the fatal shot would have to have been fired by one of the two remaining passengers, either [redacted] or Rowe.

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Rowe, since the time of the shooting, has consistently held that it was [redacted] who fired [redacted] pistol into the Liuzzo car. Prior to 1978, there is no record of either [redacted] publicly suggesting that it was Rowe who fired [redacted] pistol. The issue of who shot Mrs. Liuzzo was not raised by [redacted] in their appeals or post conviction motions. In 1978, however, [redacted] accused Rowe, in an ABC News documentary, of firing the shot which killed Mrs. Liuzzo.

Other than the statements of Rowe, [redacted] there is little evidence that would bear directly on a determination of who fired the murder weapon. [redacted]

the passenger in the Liuzzo car, was unable to identify any of the occupants of the car from which the shots were fired. Neither the murder weapon nor the shell casings from it found near the scene of the shooting were tested for fingerprints. The agent who seized the murder weapon from [redacted] car stated that [redacted] accompanied him when he made the seizure and told him that the weapon had been wiped clean. The agent's examination of the weapon at the time of the seizure led him to conclude that the pistol had been cleaned and he therefore did not request a fingerprint examination.

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In 1977 [redacted] stated in an interview conducted by the Birmingham police that he met Rowe shortly after the Liuzzo shooting, and that Rowe had said "I [or we] had to smoke a whore tonight." [redacted] recounted essentially the same story to the Task Force and indicated that Rowe's alleged statement led him to believe that Rowe had killed the woman. Rowe does not recall ever having had such a conversation with [redacted]

In 1965, two months after the Liuzzo murder, the FBI interviewed [redacted] on another matter. The subject of Rowe came up during this interview, but [redacted] never mentioned the statement Rowe allegedly made to him at that time. To the contrary, [redacted] praised Rowe for acting as an informant. [redacted] has offered no explanation why [redacted] armed with what he believed to be an "admission" by Rowe, remained silent for 12 years even though [redacted] was twice tried for

thirteen years after the murder by [redacted] These two men were convicted in the federal civil rights case arising out of the Liuzzo shooting due in large part to the testimony of Rowe. Any conclusion, then, that Rowe fired the fatal shot would rest almost entirely on a favorable assessment of [redacted] credibility. The Task Force, however, found that their credibility was very much in question while Rowe's version of the incident has remained virtually the same. b6 b7C

III. THE PROSECUTION OF THE FEDERAL CIVIL RIGHTS CASE

In light of [redacted] accusation of Rowe in 1978, the Task Force examined the extent of the information made available to the Civil Rights Division prosecution team that might have had a bearing on their assessment of Rowe's character and credibility. The Task Force also explored whether the prosecutors ever questioned the truthfulness of Rowe's testimony regarding the Trailways bus station incident and whether the FBI or the federal prosecutors suspected that Rowe may have been responsible for the death of Mrs. Liuzzo.

The FBI provided the prosecutors of the civil rights case with voluminous materials on the Liuzzo killing and the activities of the Klan in Alabama. However, not all information from Rowe's FBI informant file or from other informant files was supplied to the prosecutors. This reluctance to make informant files fully available apparently was not unique to this case but rather reflected FBI policy at the time. Whether access to this additional information would have

that the passenger in the Liuzzo car was not [redacted] b6 b7C There was, therefore, no impropriety in the federal prosecutors' use of Rowe as a witness.

[redacted] b6 b7C

[redacted] b6 b7C

OUTSIDE SOURCE

Executive Director
Federal Bureau of Investigation
Department of Justice
Washington, D. C.

Re: Gary Thomas Rowe
Appellee
vs
State of Alabama
Appellant
In The Eleventh Circuit
Court of Appeals for the
United States of America
Case No. 80-7874

Dear [redacted]

You will find enclosed a photo copy of the Opinion written by the Eleventh Circuit Court of Appeals affirming the United States District Court for the Middle District of Alabama, which, of course, enjoined the prosecution of Gary Thomas Rowe for murder in the first degree of Viola Gregg Liuzzo. b6 b7C

I thought you might be interested in this Opinion.

ENCLOSURE

Yours very truly,

[redacted]

JPL/ar

Enclosure

62-118023-298

7 JUN 24 1982

9 [redacted] b6 b7C

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JUL 20 1982

J. PAUL LOWERY

Gary Thomas ROWE, Plaintiff-Appellee,

v.

Carl GRIFFIN, etc., Defendant,

Hon. Jesse O. Bryan,
Defendant-Appellant.

No. 80-7874.

United States Court of Appeals,
Eleventh Circuit.

May 17, 1982.

Alabama prosecutor appealed from an order of the United States District Court for the Middle District of Alabama, Robert E. Varner, Chief Judge, 497 F.Supp. 610, permanently enjoining him and his successors in office from further prosecuting a former government informant for the 1965 murder of a civil rights worker. The Court of Appeals, Fay, Circuit Judge, held that in the absence of credible evidence that the informant testified untruthfully or otherwise failed to perform his part of a bargain for immunity from prosecution in return for aiding the government's investigation of the murder and testifying for the government, the prosecution of the informant by state prosecutors was per se a bad-faith prosecution and was subject to injunction.

Affirmed.

Thornberry, Circuit Judge, sitting by designation, filed a specially concurring opinion.

1. Courts ⇐508(7)
Declaratory Judgment ⇐276

Ordinarily a federal court should refrain from interfering with pending state criminal prosecution, either by injunction or declaratory judgment.

2. Courts ⇐508(7)

Equitable intervention in pending state criminal prosecution is appropriate only where there exists special circumstances which create threat of great, immediate, and irreparable injury, including prosecutions taken in bad faith or for purpose of harassment.

3. Courts ⇐508(7)

Absent credible evidence that government informant testified untruthfully or otherwise failed to perform his part of a bargain for immunity from state prosecution in return for aiding investigation and giving testimony for state, prosecution of witness was per se bad-faith prosecution and was subject to injunction by federal court.

4. Criminal Law ⇐42

Under self-incrimination clause of Fifth Amendment, evidence of guilt induced by government promise of immunity is coerced evidence and may not be used against accused. U.S.C.A.Const.Amend. 5.

5. Witnesses ⇐304(3)

For purposes of compelling testimony which otherwise would be privileged by Fifth Amendment, all that is constitutionally required is grant of use immunity. U.S.C.A.Const.Amend. 5.

6. Criminal Law ⇐42

As matter of fair conduct, government is required to honor agreement not to prosecute when it appears from record that agreement was made, that defendant has performed on his side, and that subsequent

62-118023-298
ENCLOSURE

prosecution is directly related to offenses in which defendant, pursuant to the agreement, either assisted with the investigation of or testified for the government. U.S.C. A.Const.Amend. 5.

7. Criminal Law ⇐31

Three-part test for determining whether state criminal prosecution is improperly motivated is not applicable where bad faith is evident as matter of law.

Appeal from the United States District Court for the Middle District of Alabama.

Before THORNBERRY *, FAY and HATCHETT, Circuit Judges.

FAY, Circuit Judge:

The District Court for the Middle District of Alabama has permanently enjoined defendant Jesse O. Bryan, the District Attorney for Lowndes County, Alabama, and his successors in office from further prosecution of plaintiff Gary Thomas Rowe for the murder of Viola Liuzzo. 497 F.Supp. 610 (1980). The familiar question on appeal is whether, under *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), this federal court injunction of a pending state criminal prosecution is proper. We find that it is. The prosecution of Rowe is within the "bad faith" exception to the *Younger* doctrine. The order of the District Court is affirmed.

The criminal prosecution of Rowe is related to a murder which occurred seventeen years ago during the Selma to Montgomery Civil Rights March. Mrs. Liuzzo was killed on the evening of March 25, 1965, when her automobile was overtaken and fired upon by Ku Klux Klansmen. At the time of the murder, Rowe was a paid informant for the Federal Bureau of Investigation (FBI), working undercover within the Ku Klux Klan. The day after the murder, Rowe reported it to his FBI contact, explaining that he was with the three Klansmen who killed Mrs. Liuzzo, but that he did not fire a shot at her car. Rowe aided the FBI in locating evidence of the crime and identified the Klansmen as William Eaton, Eugene Thomas, and Collie Wilkins. (Eaton is now deceased.) After being assured of immunity from prosecution by the Attorney General and the Assistant Attorney General of the State of Alabama, who have both since retired from office, and by the FBI, Rowe testified against the Klansmen. He appeared before a state grand jury, in two state murder trials, before a federal grand jury, and in a federal trial. The state trials resulted in a mistrial and in an acquittal, but the Klansmen were convicted by the federal court of violating Mrs. Liuzzo's civil rights. Following the trials, Rowe was relocated and given a new identity by the FBI.

Thirteen years later, District Attorney Bryan attended a district attorneys' conference in Mobile, Alabama. At the conference another district attorney informed Bryan that new information had surfaced regarding the Liuzzo murder. Bryan investigated further and learned that Rowe and the two surviving Klansmen had recently submitted to polygraph tests conducted under the auspices of American Broadcasting Company. Bryan obtained the filmstrip

* Honorable Homer Thornberry, U. S. Circuit Judge for the Fifth Circuit, sitting by designation.

prepared by the television company and the results of the polygraph tests. The test results indicated to Bryan that Rowe had fired the shots which killed Mrs. Liuzzo. Bryan then presented his case to the Lowndes County Grand Jury which returned an indictment for murder against Rowe in September, 1978. Prosecution of Rowe was halted by a federal injunction on October 2, 1980. The injunction was granted by the District Court on the basis that *Younger's* abstention doctrine was inapplicable because the prosecution of Rowe was in bad faith and under extraordinary circumstances. Federal jurisdiction was based on 42 U.S.C. § 1983 and 28 U.S.C. § 1343.[1]

[1-3] Ordinarily a federal court should refrain from interfering with a pending state criminal prosecution, either by injunction or declaratory judgment. *Younger v. Harris, supra; Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971). Equitable intervention is appropriate only when there exist special circumstances which create a threat of great, immediate, and irreparable injury. *Kugler v. Helfant*, 421 U.S. 117, 123, 95 S.Ct. 1524, 1530, 44 L.Ed.2d 15 (1975); *Younger*, 401 U.S. at 46, 91 S.Ct. at 751. Prosecutions taken in bad faith or for the purpose of harassment fall within this exception. *Younger*, 401 U.S. at 49–54, 91 S.Ct. at 753; *Fitzgerald v. Peek*, 636 F.2d 943, 944 (5th Cir. 1981); *cert. denied*, 452 U.S. 916, 101 S.Ct. 3051, 69 L.Ed.2d 420 (1981); *Wilson v. Thompson*, 593 F.2d 1375, 1381 (5th Cir. 1979), *aff'd after remand*, 638 F.2d 801 (5th Cir. 1981); *Shaw v. Garrison*, 467 F.2d 113, 119–22 (5th Cir.), *cert. denied*, 409 U.S. 1024, 93 S.Ct. 467, 34 L.Ed.2d 317 (1972).[2] Such a situation is present in this case. We find that, in the absence of credible evidence that Rowe testified untruthfully or otherwise failed to perform his part of the bargain, the prosecution of Rowe, after Rowe was assured of immunity from prosecution by state prosecutors, is *per se* a bad faith prosecution.

The record discloses that on at least one occasion the Attorney General and the Assistant Attorney General of Alabama met with Rowe and FBI agents to discuss the conditions under which Rowe would agree to testify against the Klansmen and a deal was struck: Rowe was given assurances of immunity from prosecution in return for his testimony. This grant of immunity was not specifically authorized by statute, but the state's highest legal officers assured Rowe that he would not be indicted or prosecuted for any of his activity on the occasion of the murder. The quid pro quo of this bargain is obvious. Rowe was literally the prosecution's entire case.

Applying the concept of equitable immunity[3] to the promise made by the state

1. Section 1983 is an "expressly authorized" exception to the federal anti-injunction statute, 28 U.S.C. § 2283. *Mitchum v. Foster*, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972).

2. No separate showing of irreparable injury is required when it is evident that the state prosecution is in bad faith or for harassment purposes. *Wilson*, 593 F.2d at 1382; *Shaw*, 467 F.2d at 122.

> In such circumstances the reasons of policy for deferring to state adjudication are outweighed by the injury flowing from the very bringing of the state proceedings, by the perversion of the very process that is supposed to provide vindication, and by the need for speedy and effective action to protect federal rights.
>
> *Younger*, 401 U.S. at 56, 91 S.Ct. at 755 (Stewart, Jr., concurring), *quoted in Wilson*, 593 F.2d at 1382 n.11.

3. The concept of equitable immunity is not well defined. *See United States v. Weiss*, 599 F.2d 730, 735 n.9 (5th Cir. 1979). In the *Whiskey Cases*, 99 U.S. 594, 595, 25 L.Ed. 399 (1878),

prosecutors, the District Court held that the promise should be enforced, yet inexplicably limited Rowe's immunity to use immunity. This characterization is wrong as a matter of law. The promised immunity was not limited solely to excluding use of Rowe's testimony and evidence derived therefrom in a subsequent prosecution of Rowe; Rowe was told there would be no subsequent prosecution. Thus, Rowe was offered transactional immunity in return for his cooperation and testimony against the Klansmen.[4]

Similar promises have been considered, but not enforced, in *United States v. Calimano*, 576 F.2d 637 (5th Cir. 1978) and *United States v. Weiss*, 599 F.2d 730 (5th Cir. 1979).[5] In both cases the defendants asserted that they were promised that they would not be prosecuted if they cooperated in obtaining evidence against others. In *Calimano*, the defendant had perjury charges pending against him when he met with the federal prosecutor to discuss fraudulent activities in the home health care industry. It was understood between the parties that Calimano would not answer any questions involving the perjury charges and that he would not testify for the government. Prior to trial Calimano moved to dismiss the indictment, claiming that he submitted to the interview because the prosecutor promised to dismiss the perjury charges. 576 F.2d at 638–39. The court, however, agreed with the prosecutor that no firm commitment had been made to drop the charges. Moreover, Calimano was not prejudiced by his cooperation, because he made no self-incriminating statements, was asked no questions regarding the perjury charges, and was not called by the government to testify against his confederates. *Id.* at 640. In *Weiss*, FBI agents confronted Weiss with evidence they had amassed against him and suggested that if he cooperated with federal prosecutors, the prosecutors might be persuaded not to bring him to trial. Weiss agreed to cooperate and the next day he met with a government attorney to discuss the involvement of organized crime in the Atlanta nightclub industry. Weiss was not questioned regard-

the Supreme Court indicated that informal promises of immunity should be enforced by application to the executive branch. More recent cases indicate that under appropriate circumstances informal promises may be enforced by the judiciary. *E.g., Weiss, supra; United States v. Goodrich*, 493 F.2d 390 (9th Cir. 1974); *United States v. Sanderson*, 498 F.Supp. 273 (M.D.Fla.1980). *See also United States v. D'Apice*, 664 F.2d 75, 78 n.6. (5th Cir. 1981).

4. Rowe testified that he was told he would never be prosecuted for the Liuzzo murder. Record, Vol. 2, at 106. The then Assistant Attorney General, Joe Gantt, confirms that Rowe was offered absolute immunity. His affidavit states that he assured Rowe of immunity from prosecution and that he was present when the Attorney General promised immunity from prosecution. Record, Vol. 1, at 16–17. The then Attorney General, Richmond Flowers, stated that his promise of immunity was limited to the duration of his term in office because Alabama case law would not permit future attorney generals to be bound by such a promise. Record, Vol. 2, at 57. *See Gipson v. State*, 375 So.2d 514 (Ala.1979). Ambiguity over the terms of such a promise should be resolved in favor of the criminal defendant. The District Court found, and we agree, that at the time Rowe gave information to the state officials he had a reasonable expectation that he would be immune from prosecution. If the promise is binding on the state, it is binding according to those terms.

5. *See also United States v. Donahey*, 529 F.2d 831, 832 (5th Cir.), *cert. denied*, 429 U.S. 828, 97 S.Ct. 85, 50 L.Ed.2d 91 (1976), in which the court refused to grant equitable immunity where the defendant testified before a grand jury pursuant to a plea bargaining agreement, but gave misleading and evasive answers.

ing the evidence against him and, after two interviews, the prosecutor concluded that Weiss was not being truthful and discontinued the talks. 599 F.2d at 733–34. As in *Calimano*, the *Weiss* court held that the government never made a firm commitment not to prosecute and, in any event, Weiss was not prejudiced by his revelations. *Id.* at 735, 737–38.

Unlike the situations in *Calimano* and *Weiss*, we are confronted with a case where it is obvious that the state prosecutors made a commitment not to prosecute Rowe. In addition, the defendants in those two cases never revealed information concerning the charges against them and they did not testify for the government. Just the opposite occurred in Rowe's case. Lead to believe that he was immune from prosecution, Rowe testified against the Klansmen at the state murder trials and disclosed information and evidence that is directly related to the prosecution now being taken against him. Without a doubt, the state would not have benefited from Rowe's willing assistance if Rowe had any inkling that he would later be brought to trial on the same charges.

[4–6] We note that, under the self-incrimination clause of the fifth amendment, evidence of guilt induced by a government promise of immunity is "coerced" evidence and may not be used against the accused. *Shotwell Manufacturing Co. v. United States*, 371 U.S. 341, 347, 83 S.Ct. 448, 453, 9 L.Ed.2d 950 (1963). For purposes of compelling testimony which otherwise would be privileged by the fifth amendment, all that is constitutionally required is a grant of use immunity. *Kastigar v. United States*, 406 U.S. 441, 458–59, 92 S.Ct. 1653, 1663, 32 L.Ed.2d 212 (1972). However, in order to secure testimony, evidence, or other cooperation from a potential criminal defendant, a prosecutor may see fit to promise complete immunity from prosecution. Although *Weiss* held on its facts that no agreement had been entered into, the case suggests that an analysis of the binding effect of an agreement not to prosecute should consider "whether there was a promise held out to which the government, as a matter of fair conduct, might be bound." 599 F.2d at 738. We believe that, as a matter of fair conduct, the government ought to be required to honor such an agreement when it appears from the record that: (1) an agreement was made; (2) the defendant has performed on his side; and (3) the subsequent prosecution is directly related to offenses in which the defendant, pursuant to the agreement, either assisted with the investigation or testified for the government.

Analogous precedent in the area of plea bargaining supports our conclusion. A defendant who pleads guilty as a result of a plea bargaining agreement has a due process right to enforcement of the bargain. *Santobello v. New York*, 404 U.S. 257, 262, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971); *United States v. Block*, 660 F.2d 1086, 1089–90 (5th Cir. 1981).

In *Santobello*, the defendant plead guilty after a state prosecutor promised not to make a sentencing recommendation. At sentencing, however, another prosecutor recommended the maximum sentence. 404 U.S. at 258–59, 92 S.Ct. at 496. The Supreme Court reversed the conviction and remanded to the state courts, emphasizing that the state was bound by the prosecutor's promise, regardless of whether the prosecutor's breach was inadvertent or played no part in the trial judge's sentencing decision. *Id.* at 262–63, 92 S.Ct. at 498. The Court's remarks concerning the role of plea bargaining in the criminal justice sys-

tem are particularly pertinent to our decision:

> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.

Id. at 262, 92 S.Ct. at 498.

[7] This contractual analysis applies equally well to promises of immunity from prosecution. When such a promise induces a defendant to waive his fifth amendment rights by testifying at the trial of his confederates or to otherwise cooperate with the government to his detriment, due process requires that the prosecutor's promise be fulfilled. We hold that once the defendant's good faith compliance with the terms of the agreement is established, the state must perform on its side and any attempt by the state to breach the agreement is *per se* a bad faith prosecution. *Cf. Acosta v. Turner*, 666 F.2d 949, 953 (5th Cir. 1982) (where the defendant stipulated to competency in reliance on a promise of the state trial court, the court must keep its promise).[6]

In this case, Rowe has established that he reached an agreement with the highest law enforcement officers of the State of Alabama pursuant to which he was promised immunity from prosecution in return for his testimony. In reliance on that bargain, Rowe testified for the state in the murder trials of the Klansmen. Rowe has therefore made a *prima facie* showing that he was promised immunity and that he complied in good faith with the terms of the agreement.

The only evidence in the record going to Rowe's lack of good faith is testimony indicating that Rowe perjured himself when he testified before the state grand jury and in the state trials. Such evidence, if credited, would remove from the state any obligation to uphold the promise of immunity. The District Court, however, did not credit this testimony. That determination is subject to the clearly erroneous standard and we are mindful that an appellate court should be especially reluctant to disregard a district court's credibility choices. *Graver Tank & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275, 69 S.Ct. 535, 537, 93 L.Ed. 672 (1949); *United States v. Reddoch*, 467 F.2d 897, 898 (5th Cir. 1972). The discredited testimony was that of Lavone Coleman and Henry Snow. Coleman was a police officer at the time of the murder and Snow became a police officer in 1968. Coleman testified that, the day after the murder, Rowe admitted to shooting a woman in Selma. Snow corroborated Coleman's testimony, saying that he was with Coleman when Rowe made this admission. Both men said that they were aware, at the time, of the Liuzzo murder and of the state and federal trials, yet both men testified that for many years they told no one about this incident. In contrast, Rowe has steadfastly maintained that he did not shoot Mrs. Liuzzo. Under such circumstances, we find

6. District Attorney Bryan argues that under *Wilson v. Thompson* Rowe is required to establish improper motivation. *Wilson* established a three-part test for determining whether a state criminal prosecution is improperly motivated. 593 F.2d at 1386–87. The test is not applicable where bad faith is evident as a matter of law. *See id.* at 1384.

no basis to override the determination of the District Court that the testimony of Coleman and Snow was incredible.

We note that Coleman and Snow were called to testify at the District Court's evidentiary hearing by Rowe. District Attorney Bryan indicated that, in addition to Coleman and Snow, he called the two Klansmen and a state trooper to testify before the state grand jury. These witnesses were not called to testify at the evidentiary hearing, nor was any other attempt made to introduce evidence going to Rowe's lack of compliance.[7]

In conclusion, the record lacks any credible evidence that Rowe did not testify fully and truthfully in the state court proceedings or in some other way failed to perform his end of the bargain. Without such a showing, any attempt to prosecute Rowe is, as a matter of law, a bad faith prosecution. On that basis, we affirm the District Court's order granting a permanent injunction.[8] It is unnecessary for us to discuss other issues raised on appeal and we decline to do so.

AFFIRMED.

THORNBERRY, Circuit Judge, specially concurring:

Despite the excellence of Judge Fay's opinion, my understanding of *Younger* abstention compels me to disagree with part of his analysis. While I agree that we should require, "as a matter of fair conduct," the government to adhere to its promise not to prosecute Rowe, I cannot assent to a *per se* adaptation of the bad faith exception to *Younger* abstention.

As the majority explains in its lucid presentation of the facts, District Attorney Bryan was prompted to reopen the Liuzzo case after another district attorney informed him that Rowe had failed a polygraph test indicating that he had fired the shots that killed Mrs. Liuzzo. Believing that Rowe had perjured his testimony in subsequent prosecutions of Ku Klux Klan members, Bryan then obtained a grand jury indictment against Rowe. To support the indictment, Bryan relied on the testimony of Lavone Coleman and Henry Snow, who stated that Rowe admitted on the day after the murder to shooting Mrs. Liuzzo. Bryan also offered the testimony of the two Klansmen whom Rowe helped to convict and the testimony of a state trooper. These men did not testify before the district court, however.

The district court reached its conclusion that District Attorney Bryan acted in bad faith by "investing" in Bryan "the bad faith exhibited by all of the State court witnesses." This inference as a basis for finding

7. District Attorney Bryan testified that results of a polygraph examination spurred his investigation of the Liuzzo murder. While lie detector tests may be useful for investigation and pretrial disposition of cases, under existing law they are not admissible in evidence and no attempt was made to introduce the results of such tests at the evidentiary hearing. *See United States v. Martino*, 648 F.2d 367, 390 (5th Cir.), *rehearing en banc granted*, (Oct. 13, 1981); *Flurry v. State*, 52 Ala.App. 64, 289 So.2d 632, 643 (1973), *cert. denied*, 289 So.2d 644 (Ala.1974).

8. Judge Thornberry would affirm the trial judge's ruling by using the extraordinary circumstances exception of *Younger*. We have traveled a different route under the bad faith exception. Had we not felt such was justified, we certainly would have affirmed the trial court's ruling for those reasons outlined in Judge Thornberry's special concurrence. The trial judge granted relief based upon both theories.

bad faith is inadequate, for the possible improper motive of a witness standing alone cannot constitute bad faith on the part of the prosecutor. *See Juidice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 1219, 51 L.Ed.2d 376 (1977); *Wilson v. Thompson*, 593 F.2d 1375, 1391 (5th Cir. 1979) (Thornberry, J., specially concurring). Thus, on appeal, we are left with nothing but the fact of prosecution itself, fifteen years after the crime, from which to infer bad faith. This fact is insufficient evidence of bad faith under any prior interpretation of the bad faith exception to *Younger*. *See Wilson, supra*, 593 F.2d at 1381–83, where the court discusses the many forms of conduct which manifest "bad faith."

The difficulty of satisfying traditional constructions of the bad faith exception has led the majority to adopt a *per se* rule, which avoids traditional requirements "as a matter of law." Though this approach appears fair on the facts of this case, the majority rule, like any *per se* doctrine, encompasses cases that are today both unknown and undefinable. Thus, it is inconsistent with the concern for prudential restraint that underlies *Younger* abstention. *See Kolski v. Watkins*, 544 F.2d 762, 764–66 (5th Cir. 1977). For this reason, I regard a *per se* rule as unwise and unnecessary.

Since I cannot concur in the creation of a *per se* doctrine of unforeseeable application, and since evidence of bad faith in this case is inconclusive at best, I would rest our decision on the extraordinary circumstances exception to *Younger*. In *Younger* the Supreme Court held that extraordinary circumstances in the absence of bad faith or harassment might justify equitable relief if the complainant can prove irreparable injury. *Younger v. Harris*, 401 U.S. 37, 54, 91 S.Ct. 746, 755, 27 L.Ed.2d 669 (1971). *See also Kolski, supra*, 544 F.2d at 765. No court has defined "extraordinary circumstances," *see Kugler v. Helfant*, 421 U.S. 117, 126, 95 S.Ct. 1524, 1531, 44 L.Ed.2d 15 (1975), but it is clear that the exception is an independent ground for declining abstention under *Younger*. A court must find that an extraordinarily pressing need for immediate federal equitable relief exists, and that if relief is not granted, irreparable injury to the plaintiff will result. *See Kolski, supra*, 544 F.2d at 765. One instance of extraordinary need noted by the Court in *Younger* occurs when state authorities attempt to enforce a statute that is "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." 401 U.S. at 54–55, 91 S.Ct. at 755. It is the prosecution itself, under such a statute, that violates the Constitution.

Rowe's case is identical in this fundamental sense. He was granted immunity from prosecution for the murder of Mrs. Liuzzo. He complied with his part of the bargain. As the majority explains in its thorough discussion of equitable immunity, fairness forbids the prosecution of Rowe. Under these circumstances, the very bringing of charges against Rowe violates the Fifth and Fourteenth Amendments. For this reason, the need for federal equitable relief to avoid irreparable injury is extraordinarily pressing. Rowe has already lost his job and the secret identity given to him by the government. The real injury to Rowe, however, lies in the future. It would be the loss of the benefit of his bargain—his right not to be prosecuted. Rowe's right to have no charges brought against him would be lost irretrievably if we permit the state prosecution to proceed. His past cooperation with federal and state authorities

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Memorandum from [redacted] to Mr. Finzel
Re: [redacted] v. United States of America, et al.

ITEM	IDENTIFICATION NUMBER	DESCRIPTION
11	105-722-1A46	"1A" envelope with four photos of Eastview 13 Klavern;
12	157-352-1A104	Color photo and negative of Blanton's car;
13	157-356-1A_	Color photo and six negatives of [redacted]
14	157-352-1A121	Two color photos of Blanton's car;
15	"Attachment A"	19 Xerox copies of 5-15-61 "Birmingham Post Herald" front page (possibly attached to item one);
16	"Attachment B"	12 photo reprints and negative of item one, and 20 photo reprints and negative of reverse side of item one;
17	No FBI Number	36 black and white photos (8" x 10") of the Liuzzo crime scene and the victim.

Two of the reprints of each part of Attachment B are being used in the Amended Responses to Plaintiff's Interrogatories. The Department is being so advised prior to the filing of the Amended Responses.

Mark Kurzmann, DOJ, requested that all the OPR photos should be held at FBIHQ in view of the request of the plaintiffs in [redacted] et al., v. United States of America, et al. (U.S.D.C., E. D. Michigan), that they be shown all relevant photographs.